91-676

No. 91-

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN W. GUMBY, SR., et al.,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., McDERMOTT INC., U.E. & C.-CATALYTIC, INC., BURNS & ROE ENTERPRISES, INC., AND DRESSER INDUSTRIES INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the Third Circuit's grant of appellate jurisdiction over certain interlocutory orders contained in 28 U.S.C. §1292(b) create a new, previously unrecognized exception to the express statutory prohibition against review of remand orders "on appeal or otherwise" contained in 28 U.S.C. §1447(d) in conflict with decisions by the Fifth, Ninth and Tenth Circuits and in conflict with this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975)?

2. May Congress, pursuant to the Price-Anderson Amendments Act of 1988, 42 U.S.C. §2210(n)(2), confer original jurisdiction on the federal courts consistent with Article III's "arising under" clause:

- (a) When Congress intended for state law to provide the substantive rules of decision rather than legislating federal rules of decision;
- (b) When Congress intended that there be concurrent (not exclusive) jurisdiction between the state and federal courts;
- (c) When Congress, by granting only concurrent jurisdiction, did not intend that there be a uniform body of federal law applicable to public liability actions; and
- (d) When state law remains the independent source of the private rights at issue?

3. Did Congress impermissibly exercise the Article III judicial function or interfere with state sovereignty and federalism by declaring these state law claims as federal causes of action and retroactively providing a federal forum without changing the substantive applicable law, although courts have previously determined that these cases comprise entirely state law claims?

LIST OF INTERESTED PARTIES

The interested parties, petitioners, who appeared before the United States Court of Appeals for the Third Circuit in this proceeding are listed in the Appendix at A-1-A-22.[1] All respondents appear in the caption of the case.

1. Pursuant to Sup.Ct.R. 29.1, Petitioners state that all corporate petitioners have no parent companies or subsidiaries to be listed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, John W. Gumby, Sr., et al., ("Petitioners"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of a panel of the United States Court of Appeals for the Third Circuit, which reviewed and reversed an Order of the United States District Court for the Middle District of Pennsylvania remanding these proceedings for lack of subject matter jurisdiction.

OPINIONS BELOW

The majority and concurring opinions of the United States Court of Appeals for the Third Circuit, reproduced at A-23-A-138, are reported at 940 F.2d 832 (3d Cir. 1991). The opinion and orders of the United States District Court for the Middle District of Pennsylvania, dated March 16, 1990, are reproduced at A-139-A-158, and reported at 735 F.Supp. 640 (M.D. Pa. 1990). The opinion of the United States District Court for the Middle District of Pennsylvania dated June 14, 1990, on reconsideration is reproduced at A-159-A-161, and is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1991. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The text of the United States Constitution, Article III, Section 2, Clause 1, 28 U.S.C. §1447(c), 28 U.S.C. §1447(d), 42 U.S.C. §2014(hh) and 42 U.S.C. §2210(n)(2) are set forth in the Appendix at A-162, A-162, A-162, A-163 and A-163, respectively.

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

This case presents a unique opportunity for this Court to finally address the limitations of federal power and federal jurisdiction that lie at the heart of the Constitution. Never before has the fundamental constitutional issue embodied in Article III arrived before this Court in the procedural posture presented by this case. Thus this Court is in a position to rule on the constraints imposed by Article III as it has never done before.

Several important issues are raised but primarily there

are two: 1) The threshold issue of whether the scope of Congress's mandate that remand orders are not reviewable "on appeal or otherwise" precludes appellate review of a 1292(b) certified question concerning the constitutionality of an Act of Congress (here, the Price-Anderson Amendments Act of 1988); and 2) Whether there are any meaningful limitations to Article III "arising under" jurisdiction which preclude the federal government from divesting the states of their traditional authority to provide tort remedies to their citizens as well as exercising their jurisdiction over cases already proceeding under state tort law.

In this case, the Third Circuit recognized that the district court had properly issued its remand order on grounds within the statutory authority of the remand statute, §1447(c), by determining that it lacked subject-matter jurisdiction. However, because the district court's conclusion regarding its jurisdiction resulted from the determination that Congress exceeded its authority to grant federal jurisdiction, the Third Circuit found inapplicable the bar of §1447(d) precluding appellate review. The result-oriented Court of Appeals embarked on "virgin territory" to create a new exception to §1447(d) for instances when district courts make constitutional determinations for which the court of appeals wish appellate review. This judicial activism contravenes Congress's express intent and this Court's precedent to prevent review of remand orders by making the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court.

After creating its jurisdiction, the Third Circuit held that Congress may confer original jurisdiction on the federal courts over state law cases by simply decreeing that these actions now arise under a federal law, even though that law expressly relies on state law to provide the substantive rules of decision. Under this analysis, the bounds of Article III hold no limits on Congress's ability to confer original jurisdiction on the federal judiciary: Congress simply has to say jurisdiction exists for it to exist. However, as this Court has held, purely jurisdictional grants of federal jurisdiction such as the

Price-Anderson Amendments Act Of 1988 lack the necessary federal ingredient to create federal jurisdiction.

Review by this Court pursuant to a writ of certiorari is warranted because the Third Circuit's decision 1) conflicts with the decisions of other United States courts of appeals; 2) has impacted on important questions of federal law which have not been, but should be, settled by this Court; and 3) has decided a federal question in a way that conflicts with applicable decisions of this Court. *See* Rules of the Supreme Court of the United States ("Sup.Ct.R.") 10.1(a), (c). More specifically, review by this Court is warranted because:

(1) The Third Circuit's holding that it has appellate jurisdiction pursuant to 28 U.S.C. §1292(b) conflicts with the decisions of the United States Court of Appeals for the Fifth Circuit in *Richards v. Federated Department Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987), the Ninth Circuit in *Federal Savings and Loan Insurance Corp. v. Frumenti*, 857 F.2d 665 (9th Cir. 1988) and the Tenth Circuit in *In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir. 1959);

(2) The Third Circuit's statutory construction that the prohibition of appellate review of 28 U.S.C. §1447(d) permits review pursuant to 28 U.S.C. §1292(b) rather than by mandamus (a method of review not available here as remand was proper) conflicts with this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975);

(3) The Third Circuit's ruling that the Price-Anderson Amendments Act of 1988 creates original federal jurisdiction over state law cases reaches the question not addressed by this Court in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), *i.e.*, the precise limits of Article III and the extent to which Congress may confer federal jurisdiction over state law cases that will not necessarily implicate substantive federal questions;

(4) The Third Circuit's finding that state sovereignty and federalism are not implicated when Congress, at the behest of industry lobbying, targets legislation to oust a state court of jurisdiction over specific cases after that jurisdiction has already been established and exercised, contravenes this Court's ruling in *Railway Company v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1871).

STATEMENT OF FACTS

These Pennsylvania and Mississippi cases redressing plaintiffs' state-created causes of action, predominantly personal injury tort claims, were filed following the Three Mile Island nuclear facility ["TMI"] disaster of March 28, 1979. The Respondents are the companies that, at the time of the disaster, were the owners, operators or suppliers of TMI.

Respondents removed these cases to the United States District Courts in Pennsylvania and Mississippi alleging that Plaintiffs' claims arose under the Price-Anderson Act [hereafter referred to as "the Act"]. 42 U.S.C. §2210. Following this Court's decisions in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98-99 (1978) (Rehnquist, J., concurring) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-54, 256 (1984), the Third Circuit twice ruled in *Stibitz v. General Public Utilities Corp.*, 746 F.2d 993, 997 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) and *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986), that the Act created no federal tort causes of action and that there was no basis for federal jurisdiction for Petitioner's state law claims. Consequently, the actions were then remanded back to the state courts from which they were removed.

Following *Stibitz* and *Kiick*, Respondents lobbied Congress to amend the Act to authorize retroactive removal of all claims created by a "nuclear incident" (as opposed to an "extraordinary nuclear occurrence" as previously required) to a single federal court. *See* 42 U.S.C. §2210(n)(2). One of the chief purposes of the retrospective provision for which the Respondents lobbied is to justify an attempt to rob the Peti-

tioners filing under Mississippi's six-year limitations statute of cognizable, legitimate claims.[2] To further appease Respondents' desire to circumvent the Third Circuit's rulings in *Stibitz* and *Kiick*, Congress added that Petitioners' state-created claims were "public liability actions" which arise under federal law. *See* 42 U.S.C. §2014(hh). A-162. The Price Anderson Act Amendments of 1988 [hereafter referred to as the "Amendments"] became law on August 20, 1988.

Following the enactment of the Amendments, Respondents again removed these actions to the district court. Petitioners moved the district court for remand as Congress's amendments to the Act could not confer Article III jurisdiction without providing a substantive rule of decision in the Amendments, and Congress still relied on the substantive rules of decision of the fifty states to describe a public liability action. 42 U.S.C. §2014(hh). A-162. The Respondents opposed the petition and the United States of America intervened pursuant to 28 U.S.C. §2403 in the proceedings below.

On March 16, 1990, the lower court ruled that public liability actions are state-created causes of action:

> In this case, the Act provides that public liability actions are deemed to "arise under" section 170 of the Atomic Energy Act of 1954 (42 U.S.C. §2210). The law of the state in which the nuclear incident occurs will govern the rules for decision in such cases unless the applicable state law is inconsistent with section 170. Consequently, Congress has not

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2. The Respondents have always revealed an intent to argue that once these claims have been removed to the federal courts in Pennsylvania that Pennsylvania's two year statute of limitations must apply. *But see Ferens v. John Deere & Co.*, 819 F.2d 423 (3d Cir. 1987), *vacated*, 487 U.S. 1212, *on remand*, 862 F.2d 31 (3d Cir. 1988), *rev'd*, ___ U.S. ___, 110 S.Ct. 1275 (1990). Respondents' counsel confirmed this intent following the Third Circuit's opinion. *See* The Patriot-News, July 27, 1991, at A5 ("Alfred H. Wilcox, an attorney for GPU, reiterated that the main reason the utility wanted the cases heard in federal court was to better coordinate the proceedings. He said about 700 claims may be dropped because of the statute of limitations.").

> "codifie[d] the standards" governing personal injury actions resulting from nuclear incidents "as an aspect of substantive federal law." *Verlinden*, 461 U.S. at 497. On the contrary, this Act precludes a "standard" because of the variances in state tort laws. A-150.

The lower court continued:

> Here, the right at issue is the right to bring an action for recovery of damages for alleged tortious injuries resulting from nuclear incidents. That right is created by state law and exists regardless of the provisions of the Act. A-152.

The lower court concluded that since no federal cause of action was created by the Amendments, no federal jurisdiction existed and it therefore lacked subject matter jurisdiction as required by 28 U.S.C. §1447(c). The actions were remanded for lack of subject matter jurisdiction pursuant to 28 U.S.C. §1447(d). A-139-A-140, A-153. Simultaneously, the lower court stayed its remand order and certified its constitutional ruling for interlocutory appeal. A-139-A-140.

The United States and the Respondents filed interlocutory appeals pursuant to 28 U.S.C. §1292(b). Respondents also filed notices of appeals on April 13, 1990. Petitioners and the United States filed in the district court motions for reconsideration. Petitioners sought to lift the stay of remand and certification for interlocutory appeal. The United States sought to have the district court issue an advisory opinion to end run the prohibition of appellate review of remand orders.

The Third Circuit, by order dated April 17, 1990, stayed the interlocutory appeals pending a ruling by the district court on the two motions for reconsideration. On June 14, 1990, the district court denied both motions. A-159. Respondents filed notices of appeal from the June 14, 1990 order. A petition for a Writ of Mandamus was also filed. On July 12, 1990, the Third Circuit consolidated the inter-

locutory appeals with the direct appeals and oral argument took place on February 7, 1991.

The Third Circuit in an opinion and judgment filed on July 26, 1991, reversed the district court. The Third Circuit made several rulings challenged herein: that despite finding that the district court's remand order was authorized by the removal statute, the prohibition against appellate review of remand orders did not apply; that Congress can confer Article III jurisdiction over federal courts of state-law causes of action without creating any federal substantive law; and that Congress, in conformity with constitutional principles of state sovereignty and federalism, may retrospectively divest a state court of jurisdiction of long-pending, properly filed, state law claims.

On August 14, 1991, Petitioners moved to stay the mandate of the Third Circuit. On August 30, 1991, the Third Circuit granted Petitioners' motion and stayed the mandate until October 24, 1991.

Petitioners now seek review of these actions in this Court.

REASONS FOR ALLOWING THE WRIT

A. CHIEF JUSTICE REHNQUIST'S WARNING IN *THERMTRON* HAS COME TO FRUITION: THE THIRD CIRCUIT HAS RENDERED MEANINGLESS THE APPELLATE REVIEW PROHIBITION OF §1447(D) BY EXCEPTING INTERLOCUTORY REVIEW

As then Justice Rehnquist, in his dissent in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1975) (Rehnquist, J.), warned of the mandamus exception engrafted upon the §1447(d) prohibition of appellate review of remand orders: "Such devices would soon render meaningless Congress's express, and heretofore fully effective, directive prohibiting such tactics because of their potential for abuse by those seeking only to delay." Here, the Third Circuit refused to heed this warning and recklessly created a new §1292(b)

exception to §1447(d)—a method of review not even permitted by the majority's holding in *Thermtron*.

Until the Third Circuit's opinion, it was always recognized, notwithstanding the limited *Thermtron* mandamus exception, that Congress's express prohibition of appellate review of remand orders means what it says, *i.e.*:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it is removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. §1447(d). Thus, except in civil rights cases, appellate review of remand orders is forbidden, unless mandamus must be exercised to ensure that the district court's remand order complies with §1447(c).[3] *Thermtron*, 423 U.S. at 351. The Third Circuit does not agree with this interpretation and now advocates interlocutory appeals pursuant to §1292(b) whenever a district court "certifies an unsettled question of constitutional proportion." 840 F.2d at 848. A-66.

Congress, however, has for over 100 years intended that there be no doubt as to the finality of an order of remand to a

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3. Evident by the language of the statute itself, Congress clearly knows how to make exceptions to the prohibition of appellate review when it desires appellate review. Congress has created similar exceptions in other statutes. *See e.g.* The Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. §1819(b)(2)(C). This argument was not lost on the Third Circuit which in its drive to reach the merits of this case, ignored, as not being dispositive, Congress's omission of an exception to appellate review of a remand order to the Amendments. 940 F.2d 848 n.10. A-67. The Third Circuit also ignored this Court's directive that Congress's silence on the creation of federal jurisdiction must yield to the express language of the statute itself. *See e.g. Sedima, S.P.R.L. v Imrex Company, Inc.*, 473 U.S. 479, 495 n.13 (1985). In the present situation, Congress has balanced between appellate review and interference in the conduct of litigation commenced in state court. Appellate review lost that battle; it is not the Third Circuit's province to act as a super-legislature over Congress and rewrite the law. *See Sedima*, 473 U.S. at 499 ("Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress").

state court. *See e.g. Morey v. Lockhart*, 123 U.S. 56 (1887). Congress's clear purpose has been to avoid protracted disputes over questions of jurisdiction by allowing the district courts to be the final arbiters of removal disputes. Congress decided that the elimination of the delay caused by appellate review outweighs correcting the district courts' occasional errors in remand orders. Underlying Congress's decision is the fact that the removing party is not out of court, rather it is simply in a different forum than it would prefer.

This legislative scheme has been recognized by the Fifth Circuit to preclude review of remand orders where constitutional determinations are made by the district court. *See Richards v. Federated Department Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987). Congress's intent to prevent appellate review of remand orders, even those which touch upon questions of constitutional proportions, is supported by the repeal of the specific statute that provided appellate review of any order of a federal court which found an Act of Congress unconstitutional. *See* 28 U.S.C. §1252, *repealed*, Pub.L. 100-352, §1, June 27, 1988, 102 Stat. 662. Thus, as this Court held in *Morey v. Lockhart*, 123 U.S. at 65:

> It is difficult to see what more could be done to make the action of the [district] court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case; and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.

Similarly, the Ninth and Tenth Circuits recognize that Congress intended to preclude appellate review of instances where the district court certifies questions pursuant to §1292(b). *See Federal Savings and Loan Insurance Corp. v. Frumenti*, 857 F.2d 665, 669 (9th Cir. 1988) and *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959).

Nevertheless, despite the unambiguous bar to appellate review, the Third Circuit found that the statute's language,

"not reviewable on appeal or otherwise," does not preclude an interlocutory appeal on a certified question when the district court makes a constitutional determination. The Third Circuit's opinion irreconcilably conflicts with Congress's expressed intent and the Fifth, Ninth and Tenth Circuits, and ill-advisedly expands the jurisdiction of the Courts of Appeals. Contrary to the balancing inherent in Congress's enactment of §1447(d), the Third Circuit's judicial fiat plainly disregards Congress's expressed intent to prohibit appellate jurisdiction in its drive to reach the merits of the case. *See* 940 F.2d at 845-46. A-61-A-64. The Third Circuit plainly refused to acknowledge what had always been established law. In so doing, it created a loophole to appellate jurisdiction of unknown dimensions.

As readily evident from the Third Circuit's opinion, what is a "federal question" is not readily discernable. What the Third Circuit means by a "question of constitutional proportion" could easily confound the Courts of Appeals and district courts for years through countless appeals—all adding unnecessary delay to thousands of cases remanded but arguably touching on so-called "questions of constitutional proportion." Given the increasingly heavy dockets of the Courts of Appeals, the Third Circuit's ill-defined guideline for expanding appellate jurisdiction further is unwarranted, let alone being contrary to congressional intent.

Congress and this Court have clearly stated that appellate review of remand orders based on a jurisdictional determination will not be tolerated, regardless of whether the District Court's determination of its jurisdiction is right or wrong. *See Thermtron*, 423 U.S. at 343. *See also Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331, 1332 (1976). These same rulings must apply even where the district court's jurisdictional determination is premised upon a question of constitutional proportion. Indeed, Congress has repealed appellate jurisdiction for orders which find Acts of Congress unconstitutional.

While, the Third Circuit may not agree with these directives, it may not judicially legislate them away. This Court should review this case to ensure that the congressional policy prohibiting appellate review of remand orders is not further

disrupted or eroded and to settle the inter-circuit conflict created by the Third Circuit's judicial activism.

B. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THERE EXIST ANY MEANINGFUL LIMITS TO ARTICLE III, "ARISING UNDER" JURISDICTION

Not since *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), has the issue of the limits of the Constitution, Article III "Arising Under" jurisdiction been specifically addressed by this Court. This case squarely presents that issue. As Circuit Judge Scirica recognized in his concurring opinion, "[t]his case, therefore, raises the question of the extent to which Congress may confer federal jurisdiction over state law cases that will not necessarily implicate substantive federal questions." 940 F.2d at 862. A-102.

This Court has long recognized that a mere jurisdictional grant by Congress is constitutionally deficient. *Osborn*, 22 U.S. at 827. Congress must go further than simply confer jurisdiction; it must provide some substantive matter determinative of the outcome. *Verlinden*, 461 U.S. at 496. Congress did not make the necessary effort in the Amendments; there is still no federal ingredient in the Petitioners' claims.

Both the Act and the Amendments express Congress's intent to encourage the development of the nuclear industry. However, as this Court held in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98-99 (1978) (Rehnquist, J., concurring) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-54, 256 (1984) the Act did not create a federal cause of action. State law remedies, such as the Petitioners', were left undisturbed. *Cf. English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 2280 (1990). Those issues were litigated before the Third Circuit in *Stibitz* and *Kiick*. There, the Third Circuit also found that Petitioners' claims were state tort claims which did not raise a federal question. The Respondents then successfully lobbied Congress to change the Act. Congress enacted the Amendments which, in essence, purport to say that Petitioners' state law claims now

arise under federal law and confer original (albeit concurrent) jurisdiction on the federal courts. *See* 42 U.S.C. §§2014(hh), 2210(n)(2).

Query: Whereas before the Amendments no federal claims were present, can Congress now simply by saying that these same claims arise under federal law satisfy the Constitution? "[W]e are squarely presented with the question of defining the "gap" between the scope of the statutory grant and the limits of Article III." 940 F.2d at 865. A-108. This important question of federal law can only be decided by this Court and should finally be settled by this Court.

If the Third Circuit is correct, then Congress is not limited by Article III, because Article III means nothing. Under the Third Circuit's analysis, mere incantation of the magical words—"arising under"—satisfies Congress's obligations to the Constitution. Surely, this is not the case. Yet, it remains uncertain how far Congress can go before it approaches the limit of the "arising under" clause. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). *See also Mesa v. California*, __ U.S. __, 109 S.Ct. 959, 968-69 (1989).

While there is no doubt that Congress would like to provide a federal forum to litigate these state law cases, is that enough? Must not Congress provide a substantive rule of decision for it to do so? If so, the legislative history of the Amendments and the concurring opinion of the panel below reveal that Congress did not make the necessary effort to satisfy the Constitution. *See* Report of Committee on Interior and Insular Affairs on HR 1414 (1988) at 18 ("Rather that designing a new body of substantive law to govern such cases, however, the bill provides that the substantive rules for decision in such actions shall be derived from the law of the State in which the nuclear incident involved occurs[.]"). *See also* 940 F.2d at 863 ("I believe Congress intended for state law, acting of its own force, to provide the rules of decision in public liability actions."). A-105. The Amendments are nothing more than an attempt to adopt state law as federal law, which is contrary to this Court's precedents. Among these are:

- *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900) ("The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law").
- *Shulthis v. McDougal*, 225 U.S. 561 (1912) (A dispute regarding title to lands obtained by federal law does not raise a federal question).
- *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983)(Questioning the validity of such a broad application of Article III).

The Amendments do not express an intent to create a federal common law, a situation in which this Court has found a sufficient congressional intent to confer federal jurisdiction. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Congress intended to create a federal common law under the Taft-Hartley Act, 29 U.S.C. §185). Nor do the Amendments approach a recognized domain of exclusive federal interest, such as bankruptcy or federal lands. *See National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352 (1969) (Congress intended for federal law to be supplemented by state law in the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*).[4] In light of Congress's omissions, the legislative scheme of the Amendments lacks constitutional foundation and is contrary to this Court's precedent.

Given the determinant role state law plays in the Amendments, the scarce likelihood of a federal question ever coming into play in Petitioners' tort claims can not confer original jurisdiction. While Congress may have an interest or concern

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4. The Third Circuit, relying principally on *Rodrigue* found that the Amendments satisfied Article III. However, the federal interest underlying the Lands Act, *i.e.*, federal lands, has no comparable reference in the Amendments, which do not implicate any exclusive federal interest but rather address state law liability for the private nuclear industry. *See Silkwood, supra*; *Duke Power, supra*.

for uniform treatment of these cases,[5] that interest alone cannot confer jurisdiction without the concomitant creation of federal substantive law.

This Court should review this case to decide if Congress satisfied Article III.

C. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE AMENDMENTS' RETROACTIVE CONFERRAL OF ARISING UNDER JURISDICTION INTERFERES WITH STATE SOVEREIGNTY AND FEDERALISM

The Amendments were specifically targeted at this litigation. Congress specifically earmarked these cases for removal, by giving the Amendments retroactive effect.[6] *See* Report of Committee on Energy and Commerce on HR 1414 (1987) at 19 ("This ensures that claims arising from the 1979 Three Mile Island accident will be covered by these provisions"). Snatching this litigation out of the state courts, for no reason other than the nuclear industry's desire for a federal forum, is particularly offensive to our federal system of government and the autonomy of the independent sovereign states and does not satisfy any legitimate legislative purpose furthered by rational means. Therefore this case is contrary to this Court's decisions in *Railway Co. v. Whitton's Administrator*, 80 U.S. 270 (1872) and *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).[7]

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5. Congress's interest in uniformity is belied by its grant of concurrent rather than exclusive jurisdiction, and the fact that the states can handle these cases uniformly. For example, the Pennsylvania state courts have the ability to transfer like cases to one jurisdiction for disposition. Pa.R.Civ.P. 213.1.

6. Congress may have also contravened the separation of powers doctrine by directing the federal courts to find that a federal cause of action arising under the constitution exists in these cases, when, it has already been judicially determined that only a state tort claim is present. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 429 (1988) (Rehnquist, J., dissenting).

7. The First and Ninth Circuits found a limited exception for national security which satisfied a legitimate legislative purpose in *Hammond v.*

Congress can not exceed that degree of sovereignty not relinquished by the states. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548-557 (1985). Here, Congress clearly has gone too far. The Amendments rob the state courts of their authority to hear cases and violate the principles of federalism embodied in the Tenth Amendment of the Constitution. The power to take pending cases away from a state court through legislative fiat is the power to destroy state governments and the principles underlying our federalist system. *See* Note, *Over-Protective Jurisdiction? A State Sovereignty Theory Of Federal Questions*, 102 Harvard L.Rev. 1948, 1961 (1989).

This Court should grant a writ of certiorari to review this important issue interfering with the delicate balance of our government.

United States, 786 F.2d 8, 12 (1st Cir. 1986) and *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 990 (9th Cir. 1987), *cert. denied sub nom., Konizeski v. Livermore Labs*, 485 U.S. 905 (1988). However, this Court in *Duke Power* found no similar exception for the private nuclear power industry.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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